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FEDERAL COMMUNICATIONS COMMISSION
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JAN 25 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Sections 12 and 19
of the Cable Television Consumer
Protection and Competition Act of 1992

Development of Competition and
Diversity in Video Programming
Distribution and Carriage

MM Docket No. 92-265

COMMENTS OF THE NYNEX TELEPHONE COMPANIES

New York Telephone Company

and

New England Telephone and
Telegraph Company

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SUMMARY

The NYNEX Telephone Companies urge the Commission to ensure reasonable and nondiscriminatory access to programming for programming distributors, including those who use video dialtone services in delivering their programming.

To further its commitment to competition in video programming delivery, the Commission should take specific actions to ensure that customers of video dialtone service have reasonable and nondiscriminatory access to programming. For example, the Commission should explicitly prohibit practices that restrict the availability of programming based on the delivery method used by a multichannel video programming distributor.

The Commission should focus upon ensuring equal access to programming, as Congress intended. The Commission should not unduly limit the scope of the 1992 Cable Act, or erect unwarranted roadblocks in the path of aggrieved persons bringing complaints. To ensure effective enforcement, the Commission should allow any person injured by conduct violating these provisions to bring a complaint before the Commission.

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COMMENTS OF THE NYNEX TELEPHONE COMPANIES

New York Telephone Company and New England Telephone and Telegraph Company (the "NYNEX Telephone Companies" or "NTCs") respectfully submit Comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") on the Development of Competition and Diversity in Video Programming Distribution and Carriage. In these Comments, the NYNEX Telephone Companies urge the Commission to ensure reasonable and nondiscriminatory access to programming for programming distributors, including those who use video dialtone services in delivering their programming.

I. THE COMMISSION SHOULD TAKE SPECIFIC ACTIONS TO ENSURE THAT CUSTOMERS OF VIDEO DIALTONE SERVICES HAVE REASONABLE AND NONDISCRIMINATORY ACCESS TO PROGRAMMING

It would clearly promote Congress' and the Commission's goals to ensure that the video programming customers of video dialtone providers receive reasonable and

equal access to video programming regardless of the means they use to deliver the programming to customers. The goals of Sections 12 and 19 of the 1992 Cable Act and this proceeding are to increase competition and diversity in the multichannel video programming market, make video programming widely available, and spur the development of communications technologies.¹

Congress recognized that competition in the delivery of video programming had not developed under the 1984 Cable Act, and sought with the 1992 Cable Act to further the development of robust competition in the video programming marketplace.² The Commission has tried to promote these same goals of competition, technological innovation, and consumer choice, in its proceedings implementing the 1992 Cable Act, and in its video dialtone initiative.³

The provisions of the 1992 Cable Act at issue in this proceeding address equal access to programming for "multichannel video programming distributors." This term does not apply directly to providers of video dialtone services. Instead, the term applies to entities that buy, select, and/or package

¹ See 1992 Cable Act, Sec. 628(a); Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 102-92, 102d Cong., 1st Sess. (1991) ("Senate Report") p. 77; House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong. 2d Sess. (1992) ("House Report") p. 27; NPRM ¶ 1.

² House Report pp. 43-44.

³ See NPRM ¶ 1; see also Telephone Company - Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd. 5781, 5787 ¶ 9 (1992).

programming and provide the programming to customers.⁴ These entities are the customers for video dialtone services, in that video dialtone is a means to deliver their programming to customers.

In order for these entities to be able to use video dialtone, they must be able to obtain programming free from conditions that favor incumbent cable providers and discourage the use of competitive delivery methods. The Commission should explicitly guarantee this by taking the following actions:

- Under Section 628(c)(2)(A), prohibit cable operators from influencing satellite programming vendors to refuse to sell their programming, or to sell the programming on unfavorable terms and conditions, to multichannel video programming distributors that use video dialtone services to deliver programming services. This will prevent cable operators from unduly or improperly influencing programmers in the sale of their programming to competing distributors that use video dialtone.
- Under Section 628(c)(2)(B), prohibit satellite programming vendors from discriminating in the prices, terms and conditions of sale or delivery of

⁴ See 1992 Cable Act § 2(c)(6), § 628(b); see also In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, MM Docket 92-259, Notice of Proposed Rulemaking, November 19, 1992 ¶ 42.

programming based on the location or type of delivery system used by a multichannel video programming distributor. This will prevent discrimination by programmers in the sale or delivery of programming to distributors that use video dialtone.

- Under Section 628(c)(2)(C) and (D), prohibit practices, understandings, arrangements, and activities that restrict the availability of programming based on the delivery method used by a multichannel video programming distributor.⁵ This will enable distributors who use video dialtone to obtain programming free of anticompetitive practices by cable operators and programming vendors.
- Under Section 616(a)(2), prohibit cable operators or other multichannel video programming distributors from influencing a video programming vendor not to deal with multichannel video programming distributors that use video dialtone as a means to deliver programming. This will guarantee that cable operators cannot coerce programming vendors not to

⁵ Section 628(c)(2)(C) was not intended to prohibit exclusive contracts only. See NPRM ¶ 31. Exclusive contracts are only an example of the types of "practices, understandings, arrangements, and activities" that prevent or hinder multichannel video programming distributors from obtaining programming. Thus, Congress instructed the Commission to prescribe regulations prohibiting such practices "including" exclusive contracts. 1992 Cable Act §§ 628(b), 628(c)(2)(C).

deal, in aspects of the sale and delivery of their programming, with distributors that use video dialtone.

These specific actions would signal the Commission's commitment to competition in video programming delivery and would prevent anticompetitive actions targeted at video dialtone providers and their customers.⁶

II. THE COMMISSION SHOULD PRESCRIBE REGULATIONS THAT ENSURE EQUAL ACCESS TO PROGRAMMING, AND SHOULD NOT LIMIT THESE REGULATIONS IN A MANNER CONTRARY TO CONGRESSIONAL INTENT

A. Section 628(b) Should Not Be Limited To Conduct Related To Vertical Integration

Section 628(b) of the 1992 Cable Act prohibits "a cable operator," as well as a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor, from engaging in unfair practices the purpose or effect of which is to hinder or prevent multichannel video programming distributors from providing programming to customers. Despite this language, the

⁶ Because the statutory provisions merely describe the "minimum contents" of regulations (Section 628), and require that regulations "shall include" certain features (Section 616), the NYNEX Telephone Companies have intentionally made some of these proposals somewhat broader than the statute's examples (for example, the NTCs' proposal under Section 628(c)(2)(A) is not limited to cable operators with an attributable interest in programming vendors). The Commission may (and should) prescribe regulations broader than the examples where the regulations would further Congress' and the Commission's goals.

FCC apparently wishes to limit Section 628(b)'s applicability to conduct of vertically integrated cable operators.⁷ The Commission "emphasizes" the fact that some of the examples in Section 628(c)(2) of regulations the FCC should prescribe discuss cable operators with attributable interests in programmers.⁸

However, Section 628(b) by its terms applies to all cable operators. The general prohibition of Section 628(b) should not be limited by examples of the "minimum" content of the regulations to be prescribed.⁹ Instead, as discussed, the examples should be implemented in such a manner as to be in accord with the general prohibition.¹⁰ While practices related to vertical integration are of concern, there are many other ways in which cable operators (which generally have held a local monopoly for a number of years) can improperly influence the distribution of video programming (by, for example, imposing restrictive conditions for carriage upon video programmers).¹¹ As Congress found, by virtue of their local monopolies, cable operators have "undue market

⁷ NPRM ¶ 8 and n. 18.

⁸ Id. n. 18. The Commission also asks if it should apply the prohibitions of Section 628 only where an entity is vertically integrated. NPRM ¶ 11.

⁹ 1992 Cable Act § 628(c)(2).

¹⁰ See note 6, supra.

¹¹ See, e.g., B. Owen, S. Wildman, Video Economics, Harvard University Press 1992, pp. 240-245 (discussing power of local cable monopolies as buyers of programming services).

power . . . as compared to that of consumers and video programmers."¹²

B. The Commission Should Not Define Attributable Interest Or Affiliation Under These Sections In Terms Of "Control" Of A Video Programming Provider

The FCC asks whether "attributable interests" and "affiliation" as used in Sections 12 and 19 should be defined in the same manner as the broadcast attribution criteria of Rule 73.3555, and suggests that any definition adopted should "be sufficient to determine whether an entity actually controls another entity."¹³ The standard under Rule 73.3555 is whether a party "owns, operates, or controls" a broadcast station.¹⁴ Similarly, the telco-cable cross-ownership ban prohibits telephone companies from providing video programming through an affiliate "owned by, operated by, controlled by, or under common control with the common carrier."¹⁵ In contrast, Sections 12

¹² 1992 Cable Act § 2(a)(2). Interestingly, the FCC chooses to adhere to the language of Section 628(b) with respect to satellite broadcast programming vendors, acknowledging that its regulations should apply to all such vendors regardless of vertical relationships. NPRM ¶ 8. Consistent with this interpretation, the FCC should adhere to the statutory language for "cable operators" as well. (And, the Commission should not presume the discriminatory practices of a "satellite broadcast programming distributor" are permissible if non-vertically integrated programmers are engaged in the same practices, see NPRM ¶ 25.)

¹³ NPRM ¶¶ 9 (emphasis added), 57; 47 C.F.R. § 73.3555.

¹⁴ See also 47 U.S.C. § 533(a).

¹⁵ 47 U.S.C. § 533(b)(1). Even so, the Commission has chosen to prohibit telco-cable affiliation that falls far short of telephone company "control" of a cable company. See 47 C.F.R. § 63.54, Note 1.

and 19 of the 1992 Cable Act do not adopt a "control" standard. Instead, these sections address the opportunity to improperly influence video programmers, or to discriminate based on affiliation. An entity does not have to "control" the programmer in order to exert influence or discriminate. Therefore, the NYNEX Telephone Companies urge the FCC to decide, consistent with Congressional intent,¹⁶ that a lesser degree of affiliation is required under these Cable Act provisions than the "control" standard of the broadcast affiliation rules.

C. The Commission Should Not Erect Roadblocks To Aggrieved Persons Bringing Complaints

1. Showing Required Under Section 628

The Commission asks for comment on the precise showing required under Section 628 to demonstrate unfair, deceptive or discriminatory conduct the purpose or effect of which is to prevent or hinder significantly any multichannel video programming distributor from providing satellite programming to customers.¹⁷

¹⁶ The House Report states that Section 616(a)(3) "was crafted to ensure that a multichannel video programming operator (sic) does not discriminate against an unaffiliated video programming vendor in which it does not hold a financial interest." House Report p. 110 (emphasis added). This indicates that any level of financial interest in a programmer would make it "affiliated" for purposes of this section. As the FCC notes, the Senate Report language quoted at ¶ 9 of the NPRM occurs in the context of several provisions that were not ultimately included in the 1992 Cable Act; moreover, even this language allows the Commission to set any criteria other than the criteria of Rule 73.3555 the Commission deems appropriate. See Senate Report pp. 77-78.

¹⁷ NPRM ¶ 10; 1992 Cable Act § 628(b).

The Commission appears to intend to broaden the showing required under this provision beyond conduct affecting particular multichannel video programming distributors. The Commission asks if the complainant must show: injury to competition in general; a threat to the viability of the complainant's service; harm to consumers; harm to other multichannel video programming distributors; or harm to both consumers and distributors.¹⁸ The Commission proposes that it may be relevant to consider whether other multichannel video programming distributors are distributing the programming alleged to be unavailable to the complainant and that, if they are, this may warrant a presumption that the defendant is not engaging in behavior that violates Section 628.¹⁹

While certain of these factors might be relevant in particular cases, no one factor should be required, and no factor should amount to a presumption, to prove any particular case. For example, the fact that a program is available to other multichannel video programming distributors does not mean the program has not been withheld from the complainant. Likewise, the fact that competition may not have been significantly harmed in general does not mean that unfair acts have not been committed against the complainant. These factors, if required, or if elevated to the level of "presumptions," could cast unwarranted obstacles in the way of complainants who,

¹⁸ NPRM ¶¶ 10, 34 and n. 26.

¹⁹ NPRM ¶ 43.

according to the statutory language, only need prove unfair acts that could deny them access to programming.²⁰

2. Geographic Market

The Commission asks what geographic market would be relevant in considering claims under Section 628.²¹ Simply put, the relevant geographic market should be the area in which the anticompetitive conduct has occurred. The Commission should only measure the effect of the alleged conduct "across different local markets" if the complainant operates and has experienced anticompetitive practices across different local markets.²² For purposes of Section 628(c)(2)(C), it would be sensible and in accordance with Congressional intent to limit the relevant geographic market to the local area that is or could be served by a cable system.²³ The fact that areas in which alternative programming distributors operate or wish to operate do not coincide exactly with the cable operator's locations is not relevant, so long as the areas overlap.

20 Moreover, in trying to simplify complaint proceedings by proposing "factors" and "presumptions," the Commission may be making the process unnecessarily difficult. For example, the Commission should not commit itself to a full-fledged study of competition in the relevant market when all it is required to do is determine whether a multichannel video programming distributor has been denied access to programming.

21 NPRM pp 11, 29.

22 NPRM ¶ 11.

23 NPRM ¶ 29.

3. Showing For Price Discrimination

The Commission should not adopt unduly complicated standards or rules for establishing discriminatory price differentials under Section 628.²⁴ Instead, the Commission should draw from the standard and the substantial body of law with which it already has experience in dealing with discrimination in the provision of services: Section 202 of the Communications Act. The first option proposed by the Commission, allowance for "reasonable" price differentials,²⁵ cannot be established in the abstract. A reasonable differential can only be determined in the context of a specific case and all its attendant facts.²⁶ The Robinson-Patman Act and international trade options the Commission suggests²⁷ have the disadvantages that they apply to price discrimination for goods or commodities, rather than services, and that both types of cases are known to involve complicated, lengthy proceedings.

A standard drawn from the Commission's experience with Section 202 cases would be better adapted to price discrimination on services, and would be fairer to litigants than the other options proposed. Thus, this standard for a violation would be that the defendant has discriminated

²⁴ See NPRM ¶¶ 20-25, 57.

²⁵ NPRM ¶ 23.

²⁶ And, it would be better to draw on the decisions and precedent established in Section 202 cases when faced with a particular situation, rather than attempting to set up new presumptions uninformed by a true case or controversy.

²⁷ NPRM ¶¶ 22-23.

unreasonably in providing or offering "like" services. Upon a showing by the complainant that the services are "like" and that there is a difference in prices, terms and conditions on which the services are offered, the burden of proof should shift to the defendant to show that the difference is reasonable.²⁸

4. Application Against Existing Contracts

The Commission's suggestion that it may not enforce pricing policies or restrictions implementing Section 628 against existing contracts²⁹ would not comport with Congressional intent, and likely would delay enforcement of this section against many violators for many years. The fact that "the statute is silent" concerning enforcement of these rules with respect to existing contracts means that the rules are to be enforced against these contracts; if Congress had intended to grandfather all existing arrangements between programmers and cable operators, Congress would have so stated.³⁰ Moreover, if existing contracts were grandfathered, while new contracts are subject to the new rules, complainants would have an

²⁸ Similarly, in establishing "presumptions" in other areas under the Cable Act, the Commission generally should avoid establishing safe harbors, but instead, once certain elements of a violation are established, should shift the burden to the defendant (who, after all, controls the relevant information) to refute the charges.

²⁹ NPRM ¶ 27.

³⁰ Instead, Congress has provided that the only contracts grandfathered in any way under Section 628 are those that grant exclusive rights, with respect to satellite cable programming, that were entered into on or before June 1, 1990. 1992 Cable Act § 628(h)(1).

impossible task in distinguishing between authorized and unauthorized discrimination. Of course, the rules cannot be enforced against conduct that occurred prior to their enactment. Therefore, the Commission's suggestion that it establish a prospective deadline for compliance that will give parties to existing contracts time to renegotiate the contracts has merit.³¹ Six months should be ample time in which to bring any existing arrangements into compliance with the new rules.

5. Exclusive Contracts

The Commission asks whether Section 628(c)(2)(C) imposes any duty on a programmer to deal with non-affiliated programming distributors. NPRM ¶ 34. The answer is yes. The section, read together with the general prohibition of Section 628(b), makes unlawful anticompetitive conduct that prevents any multichannel video programming distributor from obtaining programming. It follows logically, then, that programmers covered by these sections must provide programming to unaffiliated distributors.

The Commission also asks whether it should establish a presumption permitting exclusive distribution contracts for new program services of a specific duration such as two years.³² If it establishes such a presumption, the Commission should carefully define what qualifies as a "new program service" so as

³¹ NPRM ¶ 27

³² NPRM ¶ 36.

not to render the statute's prohibition a nullity. In addition, the Commission should not establish any such presumption for exclusive contracts lasting more than one year.

6. Data Collection Requirements

In order to satisfy its requirement to report to Congress, and in order to make information available to potential complainants, the Commission should require video programming vendors, cable operators and multichannel video program distributors to file annual reports containing a description of the services these entities offer, as well as the prices, terms and conditions for such services.³³

III. ENFORCEMENT PROCEDURES SHOULD BE REASONABLE AND DESIGNED TO ENCOURAGE ENFORCEMENT OF THESE SECTIONS

The Commission requests comment on procedures and requirements for complaint proceedings under Sections 628 and 616.³⁴ The NTCs suggest that, instead of inventing an entirely new complaint procedure, the Commission simply adopt rules similar to those that already govern formal complaints, including discovery.³⁵ Those rules require complaints to be specific, and to have factual and legal support, but do not require complainants to establish a "prima facie case."³⁶ The

³³ See NPRM ¶ 51.

³⁴ NPRM ¶¶ 33-34, 38-49, 58.

³⁵ See 47 C.F.R. §§ 1.720-1.734.

³⁶ NPRM ¶¶ 42-43.

Commission should not require complainants to do more than this at the complaint stage under these sections of the 1992 Cable Act; as the Commission points out, the information necessary to do more than allege the statutory elements of the violation, with factual and legal support, is likely not to be available to the complainant prior to discovery.³⁷ Thus, while the Commission must include the specific features required by Congress in its rules for complaint proceedings under these sections,³⁸ it should take care that those features do not add up to a burden on the complainants more onerous than those faced by other complainants before the Commission.

In addition, the NYNEX Telephone Companies ask the Commission to allow any person injured by conduct violating these provisions to bring a complaint before the Commission. In many cases, effective enforcement of these sections may depend on other entities in the marketplace, such as video dialtone providers or even consumers. While Section 628 mentions only multichannel video programming distributors, and Section 616 mentions only video programming vendors in connection with complaint proceedings, neither section states that the right to bring a complaint must be limited to such entities.³⁹ For

³⁷ NPRM ¶ 42. This problem would exist, as well, if a complainant had to establish the various "presumptions" the Commission proposes at the complaint stage. Such additional procedural requirements would throw up unwarranted roadblocks for complainants under these two sections.

³⁸ 1992 Cable Act §§ 628(f), 616(a)(4).

³⁹ 1992 Cable Act §§ 628(d), 616(a)(4).

example, if a programmer refuses to make programming available to a multichannel video programming distributor customer of video dialtone, the video dialtone customer may cancel the video dialtone service as a result. Indeed, if anticompetitive conduct leaves the video dialtone customer without programming to offer, it may go out of business, or at least be too financially strapped to pursue its complaint. However, the video dialtone provider would have the incentive and the resources, and should have the right, to challenge the unlawful conduct. Similarly, there may be situations in which only consumers deprived of competitive video services will have the incentive to challenge restrictive practices violative of these sections of the Cable Act. Therefore, the Commission's rules on complaint proceedings should make clear that complaints may be brought by any person aggrieved by conduct violating these sections of the Cable Act.

IV. CONCLUSION

For the foregoing reasons, the NYNEX Telephone Companies urge the Commission to adopt regulations guaranteeing reasonable and nondiscriminatory access to programming for all multichannel video programming distributors.

Respectfully submitted,

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